IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 206

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 413

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING OF HOUSTON INSULATION CONTRACTORS ASSOCIATION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

INDEX

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Now comes Houston Insulation Contractors Association, Petitioner in No. 206 and Respondent in No. 413, and respectfully prays the Court to grant rehearings in these causes.

These are companion cases to Nos. 110 and 111, *National Woodwork Manufacturers Association, et al* v. *National Labor Relations Board* (slip opinion dated April 17, 1967) and were held to be governed by the decision of this Court in those cases.

In the face of the admission by the Union business agent that the refusal of the employees to install materials prepared off the jobsite was because the union had no contract with the supplier of these materials the Court sustained the finding in No. 206 that the boycott was for work preservation. In No. 413 the Court found a similar boycott to be primary activity because it sought to bring pressure upon the employer to preserve work for a separate local of the same union and not for the striking employees. Having concluded that the motive of these boycotts was work preservation the majority holds that the boycotts were primary activity and therefore outside the clear prohibitions of Section 8 (b) (4) (A) and (B) and Section 8 (e) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) under the majority opinion in Nos. 110 and 111, despite the admitted secondary object of such conduct and the necessary consequence of forcing the employer "to cease using . . . or otherwise dealing in the products of . . . or to cease doing business . . ." with the suppliers of the boycotted materials.

The concurring memorandum of Mr. Justice Harlan encapsulates the basis for this decision as a determination that the Congress will not be deemed by this Court to mean what it clearly says unless there may be found a record of consideration of the problem at hand sufficient to satisfy this Court that the words enacted into law by the Congress were intended to be law. Whether or not the problems of "automation" or of "advancing technology" were explored in depth or economic analysis, Congress has

spoken, in words too plain to allow of any interpretation, that in the construction industry it is unlawful for an employer and a union to agree in any form or fashion that the employer will not do business with any other person — except for work to be done at the jobsite. It may be that in the past all construction work was done at the site of construction but on an ample record of awareness of the possible (and it is submitted, intended) result of the 1959 amendments to the Act, Congress fully understood, not the implications, for there is no room in the words of the statute for innuendo, the meaning of its clear and unambiguous words.

According to the Conference Report, the law as to secondary activity was to be preserved in the construction industry. (Conf. Rep. 1147, Appendix A hereto) Under Section 8 (b) (4) and *Sand Door (Local 1976 United Bhd. of Carpenters and Joiners of America* v. *NLRB)*, 357 U.S. 93 (1958), construing it, it was the law, and Congress intended that the law remain unchanged, that a strike to enforce an agreement which brought about the boycott of the goods of someone other than the employer was unlawful. Strike methods could not be employed to obtain such an agreement and strike methods could not be employed to enforce such an agreement. Suit for damages was the only possible means of redress available to the union for breach of such an agreement by the employer. *Local Union No. 48* v. *The Hardy Corp.*, (5 Cir. 1964) 332 F.2d 682, *Construction Production & Maintenance Laborers Union Local 383* v. *NLRB* (9 Cir. 1963) 323 F.2d 422. The rule was understood to be that where "an object" of strike methods was to cause a boycott of the goods of someone not a party to a labor controversy, that strike conduct was unlawful. *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). The majority and concurring opinions

take this limited preservation of the prior law by Congress as an intention to preserve the *status quo* to the point of determining that Congress intended to preserve the *status ante quo* the decisions in *Sand Door* and *Denver Building Trades Council.*

One of the primary and admitted purposes for the enactment of the 1959 amendments was to close loopholes in the provisions of the Act dealing with "secondary" boycotts. After considerable debate and reference of the entire matter to a Conference Committee of both the House and Senate, the present statute became law. "Work preservation" was before both houses in the opposition statements as to the obvious effect of the amendments. (Remarks of Senator Wayne Morse, 105 Cong. Rec. 16399, Appendix B hereto) Nevertheless, the Report of the Conference Commttee (attached hereto in pertinent part as Appendix A) reported out the Bill as one which would preserve the right, under Section 8 (e) for unions and management in the construction industry lawfully to agree in such a way as to create a boycott only as to on the jobsite work. The Conference Committee Report and the statements of then Senator John F. Kennedy (Appendix C hereto) concerning that Report left no room for doubt that as to work done away from the jobsite, whether by a manufacturer of finished parts for the overall construction project or otherwise, no agreement which would limit the employer would be lawful. The shadowy problems of "automation" and "advancing technology" in the construction industry were not unknown to the Congress. *Sand Door,* often referred to in the legislative history, dealt with that very problem.

Turning then to the words employed by Congress, the majority has made a nullity of the addition of Section 8(e) for if the proviso to Section 8(b) (4) (B) is to be taken when read in conjunction with Section 8(e) to create a

"work preservation" loophole, all is for naught. The hue and cry about the discrimination against other segments of labor by the provisos to Section 8(e) indicates unmistakably that Congress intended to preserve only those agreements which had, under the decisions of the Court, been found to be necessary for the continuation of orderly labor-management relations in the construction industry. It is equally clear that in doing so, Congress understood and believed that the *only* such matter requiring protection was on the jobsite subcontracting. It is this melding of principles which alone can explain the proviso tacked on to Section 8(b) (4) (B). Petitioner submits that to take the proviso of Section 8(e) as an indication of a limitation upon the scope of the overall application of its outlawry of agreements not to deal in the goods of others is to raise a problem of unequal treatment undreamed of by Congress in favor of the construction unions.

The lack of attention to the bill introduced by Representative Alger dealing with union attempts to limit prefabrication of building materials is equally explainable on the basis that Congress took care of that problem in the amendments passed. Work preservation as a matter of agreement was specifically retained in the construction industry proviso of § 8(e) for work at the site of construction. Work preservation under the clear terms of the amendments, was not to be legitimate if it took from the construction employer his freedom to purchase materials from off jobsite manufacturers or suppliers. (Conf. Rep. No. 1147, Appendix A.)

The resort to a supposed lack of legislative history which the majority and concurring opinions employ to circumvent the clear language of Sections 8(e) and 8(b) (4) (B) in this case is surely not the "interesting lesson" which Mr. Archibald Cox had in mind when he made the observation in 1947 that,

"Second, it is becoming increasingly common to manufacture 'legislative history' during the course of legislation. The accusations of outside participation made in Congress, and the elaborate interpretations in some passages in the committee reports, suggest the danger that this occurred during consideration of the Taft-Hartley amendments. Judicial exposition of the way in which the balance is struck between these opposing considerations would offer an interesting lesson in the techniques of statutory construction." 61 Harv. L.R. 1, 44.

Perhaps the most unfortunate aspect of this decision is not the substance of the three divergent inferences which the Court has drawn from that history, but the technique of statutory construction employed by the majority, as fully expounded in Justice Harlan's concurring opinion.

Four Justices, not a majority, concluded:

"That Congress meant §§ 8(e) and 8(b) (4) (B) to prohibit only 'secondary' objectives clearly appears from an examination of the history of congressional action on the subject; we may, by such an examination, 'reconstitute the gamut of values current at the time when the words were uttered'." (slip opinion, Nos. 110, 111, p. 6).

An equal number of the court drew the opposite inference from the legislative and decisional history:

"The Court undertakes a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases. But the fact is that the relevant history fully confirms that Congress meant what it said, and I therefore dissent." (dissenting slip opinion, Nos. 110, 111, p. 1)

Finally, there is a third inference, the substance of which is not nearly as crucial as the matter in which it is applied to the case:

> "We are thus left with a legislative history which, on the precise point at issue, is essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents." (concurring slip opinion, Nos. 110, 111, pp. 2, 3)

It is not uncommon for the court to interpret a statute where the precise point in issue was not faced by Congress when writing the statute. *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892), cited by the majority, is illustrative of such circumstances.

Despite the cogent warnings by Mr. Justice Harlan that:

> ". . . we must be especially careful to eschew a resolution of the issue according to our own economic ideas and to find one in what Congress has done," (Concurring slip opinion, Nos. 110, 111, p. 2)

the concurring and majority opinions turn the case not on what Congress has done but on what the Court says it has not done as shown by the "negative legislative history," and excludes the activity in question from the literal terms of the Act. The majority now require that the Legislature must make a record satisfactory to the Court before the plain language of its enactments will be applied.

Petitioner believes that if resort to legislative history is required, the record is ample to support the inference drawn by the dissenting Justices that the legislature meant what it said. If the silence of the sponsors is "pregnant with significance," this Court should not under its own precautionary words, abort the plain words of the statute by attempting to divine what that silence means.

Mr. Justice Jackson has articulated the common-sense reason for respecting the unambiguous words of a statute in the following way:

"I agree with the Court's judgment and with its opinion insofar as it rests upon the language of the Miller-Tydings Act. But it does not appear that there is either necessity or propriety in going back of it into legislative history.

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against the rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that in signing a bill the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

"Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not avail-

able to the lawyer who can afford neither the cost of acquisition, the cost of housing, nor the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

"By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, Collected Legal Papers 207. See also Soon Hing v. Crowley, 113 U.S. 703, 710, 711 28 L.Ed. 1145, 1147 5 S. Ct. 730. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-397 (1951).

In *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945), this court was faced with the difficult task of ascertaining whether the administrator of the Wage and Hour Division of the Department of Labor had authority under Section 8(f) of the Fair Labor Standards Act, 29 U.S.C. § 208(f), 52 Stat. 1060, to prohibit industrial homework as a necessary means of making effective a minimum wage order for the embroideries industry. The petitioners argued that the prohibition of industrial homework would be a form of ". . . experimental social legislation touching a matter not incidental to the order, but in the nature of a wholly independent subject beyond the purview of the statute and therefore of the Administrator's power." (id. at 256-257). The argument was bolstered by an analysis of the legislative history.

The Court gave effect to the Administrator's powers in such a way as to accomplish social and economic reforms

neither specifically nor generally within the intent of Congress in passing the measure, but within the literal wording of the statute.

Mr. Justice Roberts, dissenting, found from a detailed analysis of the legislative history that the banning of industrial homework was considered and rejected by Congress. Concerning this history, the majority had this to say,

> "The argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inference in every direction. This is such a case." (324 U.S. at 260).

It is beyond dispute that Section 8(b) (4) is aimed at the secondary product boycott. The presence of a difficult issue, which arguably was not specifically or generally contemplated by Congress, provides no proper basis for construction of words which are not ambiguous, even though giving effect to those words incidentally speaks to the possible larger economic consequences of automation.

Western Union v. *Lenroot,* 323 U.S. 490 (1945), presented the issue of whether or not the Fair Labor Standards Act of 1938 prohibited the employment of child labor in interstate commerce. Literally, the Act did not prohibit such employment. The Court turned to the legislative history, from which it concluded:

> "Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here.

> And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply to this employment, courts may not refuse to enforce them merely because we cannot understand why a singular and more direct method was used. *But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it.*" (323 U.S. at 500, emphasis added).

While the negative legislative history may have been pregnant with significance, the significance to the court was that the terms should be applied literally, as to do otherwise would,

> ". . . bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their lives." (id. at p. 508).

Of course, section 8(b) (4) was not applied literally in *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961), but the affirmative legislative history clearly showed Congressional intent to distinguish "primary" and "secondary" activities, and the case was decided without dissent. That case is not analogous to the one at hand which involves the widest possible division of opinion, and which in fact has turned on the finding that there is no history on the point in issue.

In *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966), Mr. Justice Harlan dissented by discussing the various arguments put forward by the majority, and alluded to the legislative functions of Congress and the judiciary in the following way:

> "The short of the matter is that the Court's arguments do no support the conclusion it reaches. The conclusion is of course supportable as a legislative judgment, even though arguments can be made for both sides." (id at p. 409).

He then discusses various legislative arguments contrary to those of the majority, and placed all such considerations in their proper perspective by stating:

> "I venture considerations such as these not as overcoming the countervailing ones relied on by the Court, and heretofore espoused by others, but simply to point up the fact that this is not one of those cases where seemingly straightforward statutory language must yield its literal meaning to a contrary congressional intent. What we have here are but two contrasting legislative policies, wherein the Court's duty is to take the satute as it is presently plainly written." (id at page 410).

In Nos. 206 and 413 there are at least two, perhaps more, contrasting legislative policies. And, if as Mr. Justice Harlan articulates the dilemma, Congress has *no intent* as to the problem the case at hand presents, because Congress was not squarely faced with it, there can be no overriding intent contrary to the statute's terms. In such circumstances, ". . . the Court's duty is to take the statute as it presently is plainly written." *Perry* v. *Commerce Loan Co., supra.*

By its decision the majority has thrown a stumbling block of unknown proportions in the path of legislation. When will Congress ever know when it has made a suffi-

cient record, heard enough testimony, or investigated the impact of its enactments in sufficient depth? The fact that Congress may be presently conducting investigations into the impact of automation and advancing technology upon workers generally and possible solutions for any evil results (slip opinion Nos. 110, 110, pp. 27, 28) does not indicate an intention by Congress that the construction industry must remain in lock step with the past. If that were what was intended there would be no need to search for solutions because no problems would be created and the construction industry would simply plod onward subject to boycotts of products or materials from off jobsite suppliers if such materials or supplies were ever subject to jobsite fabrication. This clearly is not what Congress intended.

This Petition for Rehearing should be granted, and both cases set down for reargument on the regular calendar.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

.....

W. D. DEAKINS, JR.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing were served upon Counsel for the National Labor Relations Board and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of May, 1967.

.....

W. D. DEAKINS, JR.
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APPENDIX A

Portion of Conference Report No. 1147, 86th Cong., 1st Sess., pp. 38-40; I Leg. Hist. (1959), pp. 942-944.

SECTION (704a) — BOYCOTTS

The House amendment contains provisions amending the secondary boycott provisions of section 8(b)(4) of the National Labor Relations Act, as amended. The Senate bill does not contain comparable provisions. The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase "or agree to cease" was deleted from section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into "hot cargo" agreements, and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language; (2) a proviso was added which specified that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary labor dispute and are distributed by another employer as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution; (3) no language has been included with reference to struck work because the committee of conference did not wish to change the existing law as illustrated by such decisions as *Douds* v.

Metropolitan Federation of Architects (75 Fed. Supp. 672 (S.D.N.Y. 1948)) and *NLRB* v. *Business Machine and Office Appliance Mechanics Board* (228 Fed. 2d 553); (4) the amendment adopted by the committee of conference contains a provision "that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of this provision is to make it clear that the changes in section 8(b) (4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc.*, and *Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953)).

SECTION 704(b) — HOT-CARGO AGREEMENTS

The Senate bill amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e) which makes it an unfair labor practice for any labor organization and any employer who is a common carrier subject to part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer, or to cease doing business with the same.

The House amendment amends section 8 of the National Labor Relations Act, as amended, by adding at the end thereof a new subsection (e) to make it an unfair labor

practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. The House amendment also makes any such agreement heretofore or hereafter executed unenforcible and void.

The committee of conference adopted the House amendment but added three provisos. The first proviso specifies —

> that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction. The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal

today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.

The second proviso specifies that, for the purposes of this subsection (e) and section 8(b)(4) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of a jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. This proviso grants a limited exemption in three specific situations in the apparel and clothing industry, but in no other industry regardless of whether similar integrated processes of production may exist between jobbers, manufacturers, contractors, and subcontractors.

The third proviso applies solely to the apparel and clothing industry.

APPENDIX B

Statement by Senator Wayne Morse, 105 Cong. Rec. 16399, II Leg. Hist. (1959), p. 1428.

The bill makes it illegal for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer" ceases or agrees to cease to do business with another employer or person. This is the so-called hot cargo agreement. Suppose a union approaches an employer and persuades him — by words that none can fail to recognize are nothing but persuasion — to cease buying the product of another employer whose employees are on strike. When the employer thus concurs in the union's plea, does that become an illegal "contract or agreement, express or implied?" Does the bill in effect compel the neutral employer to side with the struck employer rather than his employees and their union?

Furthermore, there is no reason to illegalize even a true hot cargo agreement. Present law forbids enforcing the agreement by a strike or picketing to induce a strike if the contracting employer declines to adhere to his agreement. This bill prohibits a strike or picketing to obtain entry into the agreement. Yet this bill goes even further and illegalizes the agreement even though it was not procured through a strike or picketing and even though no effort is made to enforce it by a strike or picketing. The bill thus outlaws an entirely voluntary compact with which the employer is perfectly happy to comply. Although his sympathy or interest may be entirely on the union's side, the employer is forbidden to contract on the basis of that sympathy or interest. The neutral employer is now compelled to side with the struck employer rather than the union, whether he likes it or not.

The far-reaching effect of this proposal is something on which there are no hearings. The conferees, and certainly no member of this body, have any idea how many labor agreements contain such provisions. Examples that come to my mind which would be banned by these provisions are as follows:

First. It would prevent a union from protecting the bargaining unit it represents by obtaining an agreement not to subcontract work normally performed by employees in the unit.

APPENDIX C

Statement by Senator John F. Kennedy, 105 Cong. Rec. 16354, II Leg. Hist. (1959), p. 1433.

HOT CARGO — SECTION 704(B)

The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.

This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 875) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.

It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.